

CASE NO. 29-RC-172410

REQUEST FOR REVIEW

EXHIBIT B-2

**(SUPPLEMENTAL DECISION ON
OBJECTIONS AND CERTIFICATIONS OF
REPRESENTATIVE CASE NO. 29-RC-
172398)**

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

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NEW YORK METHODIST HOSPITAL AND)	
MSO OF KINGS COUNTY, LLC,)	
A SINGLE EMPLOYER)	
)	
Employer)	
and)	Case No. 29-RC-172398
)	
)	
1199 SEIU, UNITED HEALTHCARE)	
WORKERS EAST)	
)	
Petitioner)	
)	

**SUPPLEMENTAL DECISION ON OBJECTIONS AND
CERTIFICATIONS OF REPRESENTATIVE**

On March 23, 2016,¹ 1199 SEIU, United Healthcare Workers East, herein called the Petitioner, filed a petition seeking to represent certain employees employed by New York Methodist Hospital and MSO of Kings County, LLC, a single employer.

Pursuant to a Decision and Direction of Election, issued by the undersigned on June 2, an election by secret ballot was conducted on June 17, among the employees in the following two units:

Voting Group A:

All full-time and regular part-time office assistants employed by the Employer in its Wound Care and Hyperbaric Center located at One Prospect Park West, Brooklyn, New York, excluding all other employees, guards, and supervisors as defined in Section 2(11) of the Act.

¹ All dates hereinafter are in 2016 unless otherwise indicated.

The Decision and Direction of Election indicated that if a majority of the valid ballots in Voting Group A were cast for the Petitioner, the employees in the above appropriate voting group would be deemed to have indicated their desire to be included in the existing clerical employee bargaining unit currently represented by the Petitioner, and it would bargain for those employees as part of that unit. If a majority of the valid votes cast were against representation, the employees would be deemed to have indicated their desire to remain unrepresented, and a certification of results would be issued.

Voting Group B:

All full-time and regular part-time clinical assistants (LPNs) and hyperbaric technologists employed by the Employer at its Wound Care and Hyperbaric Center located at One Prospect Park West, Brooklyn, New York, excluding all other employees, guards, and supervisors as defined in Section 2(11) of the Act.

The Decision and Direction of Election indicated that if a majority of the valid ballots in Voting Group B were cast for the Petitioner, the employees in the above appropriate voting group would be deemed to have indicated their desire to be included in the existing technical employee bargaining unit currently represented by the Petitioner, and it would bargain for those employees as part of that unit. If a majority of the valid votes cast were against representation, the employees would be deemed to have indicated their desire to remain unrepresented, and a certification of results would be issued.

There was a determinative challenge to the only ballot cast in Voting Group A. Pursuant to a Supplemental Decision on Challenges issued by the undersigned on June 27, that ballot was opened and counted on June 30. The Revised Tally of Ballots for Voting Group A made

available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	1
Number of void ballots	0
Number of ballots cast for the Petitioner	1
Number of votes cast against participating labor organization	
Number of valid votes counted	0
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	1

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted has been cast for Petitioner.

The Tally of Ballots for Unit B made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	4
Number of void ballots	0
Number of ballots cast for the Petitioner	3
Number of votes cast against participating labor organization	1
Number of valid votes counted	4
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	4

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted has been cast for Petitioner.

The Employer filed timely objections to conduct affecting the results of the elections.
The Employer's objections are attached hereto as Exhibit A.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the Employer's objections during which the parties were afforded full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

I. Notice to Employees on the Sample Ballot and the Election Ballot

In paragraphs 2 and 3 of its objections, the Employer alleges that the sample ballot attached to the Official Notice of Election failed to advise voters whether they were voting in Voting Group A or Voting Group B or that they were voting for whether to be included in an existing bargaining unit of New York Methodist Hospital employees. In paragraphs 4(b), 4 (c), and 4(e) of its objections, the Employer alleges that the Regional Office affected the results of the election by conducting these elections using ballots that failed to advise employees whether they were voting in Voting Group A or Voting Group B; conducting two elections in two separate bargaining units using ballots which failed to advise employees that they were voting for whether or not they wished to be included in a clerical unit or a technical bargaining unit; and using a ballot that did not tell employees that they would be included in an existing unit that was subject to a collective bargaining agreement. The Petitioner asserts that these allegations are without merit.

In its offer of proof, the Employer submitted a single page, the third of four, from the notice of election which contained the date, time, and place for the election, and the sample ballot. The sample ballot contains the question: "Do you wish to be represented for purposes of collective bargaining by 1199 SEIU United Healthcare Workers East?," which is the same question included on the official ballot used during the election.

Discussion

The Board uses notices of election, not ballots, to "inform eligible voters of the balloting details. The notice contains a sample ballot with the names of the parties inserted, a description of the bargaining unit, the date, place, and hours of the election, and a statement of employee

rights under the Act. Other relevant details are inserted where necessary.” NLRB, An Outline of Law and Procedure in Representation Cases, Section 24-423. Notices are posted for three days prior to elections, which gives employees an opportunity to read the election details and instructions.

The Board’s Casehandling Manual (Part 2) Representation Proceedings specifies that notices of election in a self-determination election, such as this one, must include language explaining the potential outcomes of the election. See Casehandling Manual (Part 2) Representation Proceedings, Sections 11091.2 and 11314.5. The second page of the notice of election in this case contained the required language for each unit:

If a majority of the valid ballots are cast for 1199SEIU United Healthcare Workers East, the employees in the above voting group [A or B] will be deemed to have indicated their desire to be included in the existing [clerical or technical] bargaining unit currently represented by 1199SEIU United Healthcare Workers East. If a majority of valid ballots are not cast for representation, the employees will be deemed to have indicated their desire to remain unrepresented.

Thus, the notice clearly explained not just the bargaining units, but also the choices before each voter and all potential outcomes.

Just as the notice of election, the ballots and sample ballots in this case complied with the requirements of the Board’s Casehandling Manual. Section 11306.2 of the Casehandling Manual provides: “The question on the ballot should accord with the election agreement or the direction of election. (With respect to the wording on a ‘self-determination’ ballot involving professional employees, see Sec. 11090.1). The choices on the ballot, likewise, will be dictated by the basis of the election.” The direction of election in this case stated, “[e]mployees will vote whether or not they wish to be represented for purposes of collective bargaining by 1199

SEIU, United Healthcare Workers East.” There is no indication in the Manual that additional language or directions should have been added to the ballot.

The Casehandling Manual distinguishes between self-determination elections in cases involving professional employees and self-determination elections which do not involve professional employees, such as this one. In cases involving professional employees, who may vote to be included in a unit with non-professional employees, the ballots require additional language regarding those choices. See Casehandling Manual (Part 2) Representation Cases at Section 11091.1. The Manual makes no such provision for other types of self-determination elections.

The Employer’s reliance on the sample ballots and the ballots used during the election to advise employees about the election is misplaced. The notice of election adequately notified employees about the two appropriate units, the nature of the election, and all potential outcomes. There is no evidence that the Employer posted incomplete notices of election or posted the notices for less than the required time. I further note that the Employer has not offered any evidence that voters were confused by the notice of election or the ballots. For these reasons, I overrule paragraphs 2, 3, 4(b), 4(c), and 4(e) of the Employer’s objections alleging that the sample ballots and ballots used during the election were inadequate.

II. Conduct of the Election

In paragraph 4(a) of its objections, the Employer alleges that the Region’s conduct affected the results of the election by conducting two elections in two separate bargaining units on the same date, in the same small room, at the same time, and utilizing a single ballot box for both elections. In paragraph 4 (d) of its objections, the Employer alleges that the Regional

Office affected the results of the election by using identical ballots for the two separate elections which contained the same language and which created confusion among voters who did not know in which election they were voting. The Petitioner asserts that these allegations lack merit.

In its offer of proof, the Employer states that a named witness will testify to the manner in which the elections were conducted and that the ballots from both elections were comingled in a single ballot box.

The independent investigation revealed that elections in this case were held in accordance with the Direction of Election, which stated that the elections would be held simultaneously on Friday, June 17, from 10 a.m. to 11 a.m. in the kitchen of Suite B at the Employer's facility located at 1 Prospect Park West, Brooklyn, New York.

The ballots used for the elections contained the same wording, however, the ballots for Voting Group A were blue and the ballots for Voting Group B were green. A single ballot box was used during the election. Significantly, the ballot of Damarys Rodriguez, the only employee on the voter list for Voting Group A and the only employee who appeared to vote in Voting Group A, was challenged by the Employer. Therefore, the single ballot for Voting Group A was segregated from the other ballots and was not counted until a later time. The ballots for Voting Group B, which were green, were counted at the election. The ballot for Voting Group A, which was blue, was counted on June 30. These separate counts confirm that the correct colors were used for the correct voters.

Discussion

Time, Place, and Location of the Election

The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See Ceva Logistics U.S., Inc., 357 NLRB 628 (2011) (in which the Board held that the Regional Director acted within his discretion when he directed an election on a day on which employees were scheduled to attend a meeting at the Employer's facility, but were not scheduled to work); San Diego Gas & Electric, 325 NLRB 1143 (1998) (in which the Board stated that a Regional Director has broad discretion in determining the arrangements for an election); Manchester Knitted Fashions, 108 NLRB 1366 (1954) (in which the Board stated that the Regional Director has the discretion to determine the time and place for an election).

The Employer alleges that running the election in the two voting groups created confusion, but does not provide any evidence to support this allegation. The Employer's offer of proof states simply that its witness will testify to the "manner in which the elections were conducted." The Board has held that an objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation or suspicion. See Allen Tyler & Son, Inc., 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances'"). In Audubon Cabinet Company, 119 NLRB 349 (1957), the employer filed objections alleging, *inter alia*, that the union had "threatened, intimidated, and coerced" employees. In its offer of proof, the Employer identified witnesses but did not provide any specific evidence about what would be their testimony. The Board found that this offer of proof was not sufficient to warrant further investigation:

“Objections, to merit investigation by a Regional Director, must be reasonably specific in alleging facts which prima facie would warrant setting aside an election. In our opinion, the mere allegation that the Petitioner threatened, intimidated, and coerced employees constitutes a general conclusion devoid of any specific content or substance, which fails to satisfy the Board’s requirement of reasonable specificity in the filing of objections.” Audubon Cabinet, 119 NLRB at 350-51. Here, similarly, the Employer has offered no evidence to support its contention that voters were confused by the manner in which election was conducted, a decision that rests within the discretion of the Regional Director. See San Diego Gas & Electric, 325 NLRB 1143, supra; Manchester Knitted Fashions, 108 NLRB 1366, supra. The Employer’s conclusory allegations that the employees were confused by the ballots and the election procedures are not sufficient to support its objections or justify departing from the Regional Director’s discretion regarding election details.

The Ballots and the Single Ballot Box

The Employer alleges that it was improper for the Region to use identical ballots and a single ballot box during the election.

As explained above, the ballots were printed in accordance with the requirements of the Board’s Casehandling Manual and any changes to those ballots would have deviated from those requirements. The Region did use different colors for the two voting groups and the independent investigation revealed that the correct ballot color was used for each voter. As explained above, this fact was easily confirmed because the ballot of the single voter in Voting Group A was challenged, and that ballot was segregated in a challenged ballot envelope during the election. Thus, the ballots were not, in fact, comingled. A review of the tallies of ballots

shows that all eligible employees voted in their respective voting groups. There were no voters whose names did not appear on the voter lists.

The Employer has not demonstrated that the Region's election procedures affected the outcome of the election. Accordingly, I overrule the Employer's paragraphs 4(a) and 4(d) of the objections.

III. Other Acts

In paragraph 5 of its objections, the Employer alleges that by the conduct described in the above objections and other acts, the Regional Office engaged in conduct affecting the holding of a free and fair election.² The Petitioner asserts that this allegation is without merit.

The Employer did not produce any evidence in support of this allegation that had not been submitted and considered in regard to the other objections. Accordingly, I overrule paragraph 5 of the Employer's objections.

SUMMARY AND DETERMINATIONS

In summary, I have overruled the Employer's objections in their entirety. Accordingly, I hereby issue the following Certifications of Representative certifying the Petitioner as the exclusive collective bargaining agent for the employees in the units:

² Paragraph 1 of the Employer's objections simply state that the Regional Director prepared the notices of election, that the Employer posted those notices, and that the notices provided for elections to be held in Voting Group A and Voting Group B at the same date, time, and location. The Employer does not allege objectionable conduct in this paragraph.

CERTIFICATIONS OF REPRESENTATIVE

Voting Group A

It is certified that a majority of the valid ballots have been cast for 1199 SEIU, United Healthcare Workers East and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time office assistants employed by the Employer in its Wound Care and Hyperbaric Center located at One Prospect Park West, Brooklyn, New York are hereby included in the existing clerical employee bargaining unit represented by Petitioner at New York Methodist Hospital, excluding all other employees, guards, and supervisors as defined in Section 2(11) of the Act.

Voting Group B

It is certified that a majority of the valid ballots have been cast for 1199 SEIU, United Healthcare Workers East and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time clinical assistants (LPNs) and hyperbaric technologists employed by the Employer at its Wound Care and Hyperbaric Center located at One Prospect Park West, Brooklyn, New York are hereby included in the existing technical employee bargaining unit represented by Petitioner at New York Methodist Hospital, excluding all other employees, guards, and supervisors as defined in Section 2(11) of the Act.

Request for Review

Pursuant to Section 102.69 (c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a Request for Review of this Supplemental Decision. This Request for Review must conform with the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by Washington not later than **July 22, 2016**.

A Request for Review may be E-Filed through the Agency's website, but may not be filed by facsimile. To E-File the Request for Review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a Request for Review must serve a copy on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the Request for Review.

Dated at Brooklyn, New York, on this 8th day of July, 2016.

A handwritten signature in cursive script, reading "James G. Paulsen", written in black ink over a horizontal line.

James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two Metro Tech Center Suite 5100
Brooklyn, New York 11201

EXHIBIT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

NEW YORK METHODIST HOSPITAL AND MSO OF
KINGS COUNTY, LLC,

And

Case No. 29-RC-172398

1199SEIU, UNITED HEALTHCARE WORKERS
EAST,

**MSO OF KINGS COUNTY, LLC AND
NEW YORK METHODIST HOSPITAL'S
OBJECTIONS TO CONDUCT OF ELECTIONS AND
CONDUCT AFFECTING THE RESULTS OF ELECTIONS**

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations and Statements of Procedure, MSO of Kings County, LLC ("MSO") and New York Methodist Hospital ("Hospital") by their attorneys, Epstein Becker & Green, P.C., hereby submit the following Objections to the Conduct of the Elections and Conduct Affecting the Results of the Elections conducted by the Board in the above-captioned case on June 17, 2016. The National Labor Relations Board by its Regional Director for Region 29 and its agents ("the Board") engaged in conduct that affected the results of the two separate elections conducted by the Regional Director on June 17, 2016 by creating voter confusion as follows:

1. The Regional Director prepared and issued Official Notices of Election that MSO and the Hospital were required to post and which were posted providing for two separate elections in Group A and Group B that would be held on the same date, at the same time and at the same location.

2. The sample ballot attached to the Official Notice of Election failed to advise voters as to whether they were voting in the clerical unit or the technical employee unit.

3. The sample ballot attached to the Official Notice of Election failed to advise voters that they were voting for whether or not they wished to be included in either a clerical or technical bargaining unit of New York Methodist Hospital employees.

4. The Board's conduct further affected the results of the June 17, 2016 election by:

(a) conducting two elections in two separate bargaining units on the same date, in the same small room, at the same time and utilizing a single ballot box for both elections.

(b) conducting two elections in two separate bargaining units using ballots that failed to advise employees whether they were voting in Unit A or Unit B.

(c) conducting two elections in two separate bargaining units using ballots which failed to advise employees that they were voting for whether or not they wished to be included in a clerical unit or a technical bargaining unit at the Hospital.

(d) using an identical ballot for two separate elections which contained the same language and which created confusion among voters who did not know which election they were voting in.

(e) using ballots that did not advise voters that they would be included in a unit that was subject to an existing collective bargaining agreement.

5. By the foregoing, and other acts, the Board, its agents and representatives have engaged in conduct affecting the holding of a free and fair election on June 17, 2016. MSO and the Hospital respectfully request that the results of the election in each unit (clerical and technical) be set aside and that other appropriate relief be granted.

Dated: New York, New York
June 24, 2016

EPSTEIN BECKER & GREEN, P.C.

By: 

Donald S. Krueger, Esq.
James S. Frank, Esq.

Attorneys for M&O of Kings County, LLC and
New York Methodist Hospital
250 Park Avenue
New York, New York 10177-1211
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CERTIFICATE OF SERVICE

I, Donald S. Krueger, certify that I caused a copy of MSO of Kings County, LLC and New York Methodist Hospital Objections to the Conduct of Elections and Conduct Affecting the Results of Elections in Case No. 29-RC-172398 to be filed with Region 29 by facsimile and served on 1199SEIU, United Healthcare Workers East by electronic mail at the following address:

Gwynne A. Wilcox, Esq.
Levy Ratner, PC
80 Eight Avenue, Floor 8
New York, NY 10011
gwilcox@levyratner.com

Dated: New York, New York
June 24, 2016


